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CHARLES ELMORE CR

No. 451 MISC.

In the

Supreme Court of the United States

OCTOBER TERM, 1947

MRS. KENNETH S. GANN, *et al.*,
Petitioners,

v.

MRS. WILLIE B. MEEK (now MRS. J. A. MCGUYER), *et al.*,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas — Harwood-9350

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To the Honorable the Supreme Court of the United States:

The respondent, Mrs. Willie B. Meek, now the wife of J. A. McGuyer, who is in consequence also a party respondent, respectfully submits that this cause has been correctly decided and that the petition for writ of certiorari herein filed should be denied.

STATEMENT OF THE CASE

The respondent does not take issue with petitioner's Statement of the Case—although not adopting it—, and makes a statement at this point primarily in an effort to avoid disjoined statements from the record in later portions of this brief.

In addition to certain facts not now material it was stipulated that the certificate or policy of insurance was issued on March 22, 1943, and that the respondent was the named beneficiary at the time of issuance; that Corporal Ervin married petitioner on July 17, 1943, and made formal request for change of beneficiary from his mother to her on August 24, 1943, which was filed with the Veterans Administration on August 30, 1943; that on April 29, 1944, Corporal Ervin wrote his brother, Harley Ervin, nick-named "Bud", the letter which will elsewhere in this statement be copied in part and explained; and that Arthur B. Ervin was killed in action on July 5, 1944. (Tr. pp. 3, 4, 6.)

Only three witnesses testified: Mrs. McGuyer, formerly Mrs. Willie B. Meek, respondent herein, Harley (Bud) Ervin, and Maurice Crawford. The petitioner put on no testimony and offered no evidence, notwithstanding she was in attendance on court and present during the trial. (Tr. p. 21, line 24.)

It was established by respondent's own testimony that her son saw action in the Solomons, the Marshalls, and the Marianas; that he was invalided home from Guadalcanal, wounded on Kwajalein and evacuated to Honolulu, and lost his life on Saipan. (Tr. 12-15.)

On April 29, 1944, as heretofore stated, approximately two months before his death, Corporal Ervin wrote his brother the letter relied upon by the respondent, the per-

tinent part of which reads as follows: "Speaking of Mother Bud I did change my insurance if anyone gets it Mom will get it all, I didn't change it because of what you said in your letter. I had allready for a couple reasons of my own, one I don't want 'Neg' ever to feel obligated to me, Bud I know that neither you or Kay would and never did lie to me. So I want to ask you something, but before I ask you I want to tell you how I feel about 'Neg' Bud she is the only one for me but things are all the way oka or not at all, know what I mean? Write me and tell me if things are not that way." (Tr. 19, line 15 et seq.)

"Neg" was the nick-name for his wife, and "Kay" was a girl with whom Corporal Ervin's brother, the witness Harley Ervin, referred to as "Bud", was then keeping company. (Tr. 21, lines 18-20; Tr. 26, lines 9-10.)

Maurice Crawford testified to facts showing that he, like Arthur B. Ervin, was a corporal in the Marine Corps, and like Ervin joined up in 1940. Crawford first saw action on Bougainville in the Solomons, while Ervin's first action was on Guadalcanal; and Crawford was later in action on Guam and Iwo Jima. He was awarded the Silver Star, while Ervin was decorated with the Navy Cross. (Tr. 27-28.) Crawford testified that mail service was irregular and that loss of mail was frequent; and testified sufficiently with respect to combat conditions to demonstrate that in those areas and under those conditions there was nothing but confusion.

SUMMARY OF THE ARGUMENT

The case at bar differs in a material way from the case relied upon by petitioner, *Bradley v. United States*, 10th Cir., 143 F. (2d) 573, cert. den. 323 U. S. 793, 65 S. Ct. 429, 89 L. Ed. 632. Reference is to the unqualified written statement of Corporal Ervin, made and repeated, that he had changed his insurance. Eight months previously he had effected a change of beneficiary conformably with the requirements of the Veterans Administration. He knew what was involved in making a change of beneficiary, and his letter therefore means that he had executed and forwarded to the Veterans Administration a formal request for change of beneficiary, which was not received. Cf. *Chichiarelli v. United States* (D. C.), 26 F. (2d) 484, 486. *The letter raised an issue of fact as to whether a formal request for change of beneficiary had been executed. Additionally, the letter, considering the circumstances under which it was written, was an informal designation of a new beneficiary.* Stated differently, the facts raise issues both of an informal change and of a formal change not received through the mails. Considering the conditions existing it was for the jury to decide whether Arthur B. Ervin did all that was reasonably within his power to change the beneficiary of his insurance.

In *Bradley v. United States, supra*, [143 F. (2d) 573], the insured soldier was killed while stationed at Windsor Locks, Connecticut. He had been there three days when killed and on the second day executed a confidential report in which, among other things, he stated that he had Ten

Thousand Dollars ($10,000.00) of Government insurance and that his wife was the beneficiary, and it was proved he had stated to his wife while they were in California that he would attend to the matter of changing his insurance when they got to Connecticut. The differences in the facts of the *Bradley* case and the case at bar are obvious, and decisive of the different results reached.

ARGUMENT

The Letter as Evidence:

Corporal Ervin's declaration was competent evidence and probative on the issue of revocation of the designation of his wife as beneficiary and the substitution of his mother in her place, not only by virtue of decisions of Federal Courts in similar cases, hereinafter cited, but also under the rule affirmed by the Supreme Court of Texas in *May v. Brown*, 190 S. W. (2d) 715, 717, 720. The letter was therefore properly admitted by the trial court. *Federal Rules of Civil Procedure, Rule 43(a)*, 28 U. S. C. A. following Sec. 727(c).

In *May v. Brown* the testator's son testified that his father told him "he had made a prejudicial will, but that he had changed that, he had made a new will in which he had made his son executor." The following was quoted from Chief Justice Gaines' opinion in *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 755:

> " 'The position of the testator is very different from that of an ordinary third person, whose declarations may be offered in support of an issue upon the trial of the case. Both the proponent of the will and the con-

testant claim under him. As a very general rule, he best knows the facts about which he makes the statement. His will is ambulatory, and subject to be changed or revoked. No one has any right under it until his death. He has a right to make such disposition of his property as he may wish, and, as a rule, he has no interest to induce him to make a false statement about the matter. * * * It (the excluded testimony) tended to show that what McElroy said to Hanna when he went for the will was, 'My wife wants it,' and that the testatrix had changed her mind, and had got the will into her possession, and had destroyed it for the purpose of revoking it. We are of the opinion that the introduction of such testimony is not forbidden by sound policy, and that it violates no rule of law'."

Continuing, the court said:

"It should be stated here, as it is in some cases, that the conclusion is inescapable, that if evidence is admissible as tending to show the fact of revocation of a written will by a subsequent instrument made with like formalities as the first, *it is likewise admissible as tending to show the fact of the making of the revoking instrument.*"

Before the Supreme Court of Texas decided the cases of *Compton v. Dannenbauer*, 35 S. W. (2d) 682, and *May v. Brown, supra* [190 S. W. (2d) 715] Dean McCormick wrote in the *Texas Law Review* (Vol. IV, pages 170, 181): "In conclusion, it may be seen that the Texas decisions leave it fairly clear that all declarations of the testator expressive of, or inferentially revealing a mental or emotional state then entertained by the testator are admissible if relevant to any issue in a will contest and not too remote in time. Less clearly, they indicate that probably all dec-

larations of the testator as to his own past acts of making or revoking a will, are also admitted when similarly relevant."

The Appellant's Authorities:

The appellant relies upon one case, *Bradley v. United States*, 10th Cir., 143 F. (2d) 573, cert. den. 65 S. Ct. 429, 323 U. S. 793, 89 L. Ed. 632.

As heretofore stated, in *Bradley v. United States*, [143 F. (2d) 573, 576, 577], the insured soldier was killed while stationed at Windsor Locks, Connecticut. He had been there three days when killed and on the second day executed a confidential report in which, among other things, he stated he had $10,000.00 of Government insurance, and that his wife was the beneficiary. It was not contended the insured had executed or tried to execute a change of beneficiary, and it was proved he had stated to his wife while they were in California that he would attend to the matter of changing his insurance when they got to Connecticut.

The opinion of the court discusses the question as follows, citation of authority being omitted:

> "With respect to regulations pertaining to the authorized change of beneficiary in war risk insurance cases, the courts have brushed aside all legal technicality in an effort to effectuate the manifest intention of the insured.
>
> "The undisputed evidence fully supports the finding of the trial court to the effect that the insured expressed an intent to change the beneficiary of his insurance from his mother to his wife, and if the ex-

pressed intent of the insured, without more, will justify the judicial substitution of the intended beneficiary, the judgment of the trial court is correct and should be affirmed. But the principle which actuates the courts in giving effect to the ascertained intentions of the insured has application only where the party has attempted to act for himself. The expressed intention of the insured to change the beneficiary, standing alone and unaccompanied by some affirmative act, having for its purpose the effectuation of his intention, is insufficient to effect a change of beneficiary and the courts cannot act when he has not first attempted to act for himself.

"We can only liberally construe that which he has attempted to do in his own behalf, but for some reason has failed to accomplish the desired or intended result. This is a fundamental rule of equitable jurisprudence which guides and directs equitable proceedings.

"In every case involving war risk insurance wherein the courts have recognized and decreed a change of beneficiary, the facts have amply shown not only an expressed intention, but positive and unequivocal acts on the part of the insured, designed to effectuate his expressed intentions. And in the absence of some act or deed having for its purpose the execution of the insured's intention, the courts have refused to decree a change of beneficiary." (Opinion, pages 576, 577.)

The court refused to give effect to the confidential report executed by the insured as a change of beneficiary, saying that its purpose was not to effect a change of beneficiary under the life insurance policy. "It is not a notice of any kind, is not a direction that the name of the beneficiary be changed, and does not express or indicate even indirectly or inaptly a desire to have the beneficiary changed. Indeed, it is not a voluntary expression of any

wish, desire or intention. At most it indicates a belief or understanding that his wife was the then present beneficiary." (Opinion, page 577.)

In the case at bar Corporal Ervin wrote his brother: "I did change my insurance. * * * I didn't change it because of what you said in your letter. I had allready for a couple reasons of my own * * *." *The acts of the two soldiers, as expressed in their signed communications, and the circumstances under which the statements were made, were very different.*

The Authorities Not Cited by Petitioner:

The purpose of Servicemen's insurance and the approach to questions pertaining to it are set forth by Mr. Justice Holmes in *White v. United States*, 270 U. S. 172, 46 S. Ct. 274, 70 L. Ed. 530, 538, in the following language:

> "The language (of an amendatory statute) is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the Government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself, for the soldiers' good. It was a new experience in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will."

The most frequently cited case dealing with the subject is *Claffy v. Forbes*, 280 Fed. 233, 235 (D. C. Washington; Neterer, J.). The question for determination was whether

a letter written by a soldier to his mother from a combat zone in France, in which he stated, "I wish that if you should not live to get it all that you make it so that Agnes (his niece) would get it * * *", was a sufficient designation of the niece as contingent beneficiary. The court held the letter to be a sufficient designation of a beneficiary, and rendered judgment for the niece, saying, "* * * form, formality and legal technicality must give way to common sense and remedial justice, when all doubt is removed as to the intent of the deceased soldier; * * *." Continuing, the court explained the reason for the rule of liberality in these words:

> "Throughout the history of the civilized world, since the decrees of Julius Ceasar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbord of his sword or his shield (The Customs of Duchy of Burgundy, printed at Dijon, 1694, p. 410; Coutumes de Paris, column 51, Paris, 1714); and remedial justice requires, under the facts in this case, that the designation of the niece in the letter to the mother be established from the date of presentation to and record thereof by the Bureau of War Risk Insurance."

Judge Neterer also participated in the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Leahy v. United States*, 15 F. (2d) 949, cited in *Bradley v. United States, supra* [143 F. (2d) 573] as one of the cases restrictive of the privilege of changing beneficiaries under policies of soldiers' insurance. Such is not considered the true effect of the court's decision in that case. There

the soldier, while single, named his sister as the beneficiary of his War Risk Insurance policy. After discharge from the Service he married, and died in 1923. The widow made claim to the policy proceeds, alleging that on December 18, 1921, Leahy had written a letter to the Veterans Bureau directing that she be made the beneficiary. No such letter was received. The trial court found in favor of the original beneficiary, and denied the wife's right to the insurance benefits. After reviewing the facts briefly, including the fact that Leahy was a lawyer and lived and was active for two years after the date of the letter claimed to have been written, the court said, in distinguishing the case from *Claffy v. Forbes, supra* (280 Fed. 233) and *Farley v. United States* (D. C.), 291 Fed. 238:

> "Here a mailing of the letter not being proven, and the receipt of such a letter being disproven, the case was one for the determination of the court *upon the preponderance of the evidence.*
>
> "The burden of proof was upon the appellant to establish the fact that requisite steps were taken to change the beneficiary. *We are not convinced that she sustained that burden of proof.*" (Italics added.)

In *Roberts v. United States*, 4th Cir., 137 F. (2d) 906, the insured and a fellow officer together signed some papers at the Naval Air Station at Jacksonville, Florida, which they thought included a change of beneficiary under their respective insurance policies; and in a confidential form thereafter executed the insured stated that his wife was the beneficiary of his insurance. Roberts' fellow officer who accompanied him to the Naval Air Station at Jackson-

ville was positive that they both signed the same kind of forms and designated their wives as beneficiaries in each, and delivered them to the clerk to be forwarded through proper channels. The Veterans Administration had no record of any change of beneficiary, and there was testimony to the effect that the soldier did not intend to change the beneficiary from his father to his wife. *It was held that a change was accomplished as a matter of law,* and the judgment of the trial court in favor of the father was reversed with instructions to enter judgment sustaining the widow's claim to the insurance policy proceeds.

After taking note of the volume of business transacted at military posts, making easily understandable the failure of the change of beneficiary form to reach its destination, the court said: "In the pending case, we have found that the insured not only expressed his intention to change the beneficiary in the policy, but also set in motion the machinery devised by the United States to accomplish the desired result. In this way he performed the affirmative act for the lack of which the majority of the court in the Bradley case concluded that the change of beneficiary had not been accomplished." (Opinion, page 909.)

As well stated on page 6 of the opinion of the Circuit Court of Appeals, the facts of the instant case bring it within the orbit of *Roberts v. United States* rather than *Bradley v. United States. If, as a matter of law, there was a change of beneficiary in the Roberts case, it cannot be said as a matter of law that there was no change of beneficiary in the case at bar.*

In *Collins v. United States*, 161 F. (2d) 64, the court gave full recognition to the principle that acts evidencing an intention to change the beneficiary under a policy of National Service Life Insurance should be regarded with great liberality. The opinion is couched in language supporting the respondent's position, although the chief point for determination was whether an executed change of beneficiary on the form prescribed by the Veterans Administration was valid if not received until after the death of the soldier; and it was held that a change of beneficiary was not thereby prevented from being made.

The same attorney who was successful in the *Bradley* case was on the losing side in the *Collins* case and his views, as expressed on pages 18, 19 and 20 of the petition for writ of certiorari in the *Collins* case will doubtless interest the court:

> "It is conceded by all that mere intention along, no matter how strong, is not sufficient to make the change. But in some of the cases that which is re-referred to as the equitable rule is invoked to give effect to an uncompleted change of beneficiary. There it is held that beneficiary change provisions of the insurance contract must be complied with, unless in addition to clear intention to make the change, it be further shown that insured has done all that he could to comply with the conditions, and been prevented by circumstances beyond his control from meeting the requirements. Clifford v. United States, 289 Fed. 833; Reid v. Durobraw, 272 Fed. 99; Bradley v. United States, supra.
>
> "In the Gifford case, it was pointed out that the insured was a soldier and that government insurance was involved. The court said that in view of the unusual circumstances surrounding soldiers in the army

and their restricted freedom of action, a liberal rule should be adopted in construing their acts in relation to their insurance. The court never-the-less held in that case that sufficient had not been done to amount to change of beneficiary.

"If a soldier in foreign service, in combat zone, absent from mail facilities, should have indicated his intention to change the beneficiary of his insurance by any form of written instrument, and if he had no opportunity to mail or forward it before his death in battle, then clearly this would be such a case where equity should consider that as done which ought to be done and order the change effected. We have no such case here. The insured here was in the army but in domestic service, living practically a civilian life, an officer flyer, afforded ample oportunities to have forwarded the notice of change as required. It cannot be said that he did all that he could do to meet the requirement of forwarding the notice of change of beneficiary, nor was he shown to have been prevented by circumstances beyond his control from meeting the condition. Therefore, the equitable rule cannot be properly applied to this case."

With the view so expressed the respondent has no quarrel. *The case at bar presented an issue of fact, the determination of which by the jury is conclusive upon the parties.*

Almost a year after *Bradley v. United States* was decided Judge Leibell of the Southern District of New York wrote a scholarly and interesting opinion in a case which on the facts is much like the case at bar, *United Services Life Insurance Company v. Farr*, 60 F. Supp. 829, 831, 837, 838. In that case the facts were that Lt. Gallagher was married on April 18, 1943, to the girl whom he had

known since 1939 and to whom he had been engaged since 1941, being then home on furlough from Hawaii, leaving his wife on the West Coast and returning to Hawaii on May 7, 1943. On October 21, 1943, he wrote his wife that he had been busy, that he had sent her a registered package two days before containing a picture and some insurance papers, and that he had written the insurance company to change the policy to her but had received no reply. Lt. Gallagher wrote his wife one other time, on October 30, 1943, and on November 21, 1943, was killed in action, as was his father in the first World War. The letter which Lt. Gallagher said he had written to the insurance company was not received by it, and a bill of interpleader being filed, the court said:

> "Whether the law of the District of Columbia or that of the State of Alabama is applied, it has been sufficiently established that the insured took all the steps required of him and that he could reasonably be expected to take under the facts and circumstances surrounding his request to change the beneficiary. Sitting as a court of equity, full effect will be given to the clearly expressed intention of the insured to make his wife the beneficiary of the policy and he will be deemed to have accomplished that change, having done all that he could be expected to do while in the armed forces of his country, preparing for battle at a distance of some 5500 miles from the main office of the insurance company. His widow, Marie Gallagher, named as a defendant herein, is entitled to the proceeds of the policy.
>
> "The courts should not be too exacting in insisting on formalities in the execution of legal papers by men in service, especially in the case of those who are about to enter a combat area (in expedition bus) and are busy with military preparations, with very little

time to look after their personal affairs. At such a time they naturally think of their obligations to those at home and of what effect their death in battle might have upon the fulfillment of those obligations. A soldier's estate frequently is only his life insurance. For policies issued through the Veterans Administration for National Service Life Insurance there are available at the army station forms for the change of beneficiary, such as Exhibit C, which was executed by Lt. Gallagher June 4, 1943, in the presence of Capt. Morrell, a Personnel Officer at the 165th. That form probably was executed in Hawaii where the 165th was then stationed. Commercial life insurance companies do not maintain such a convenient service at army bases, with blank forms for the change of beneficiaries. Hence there is every reason for giving effect to the intention of the insured service man in making a change in the beneficiary of such a policy, if the intention is clearly expressed in the insured's own handwriting, even though he has not complied with all the formalities required by the policy to effectuate the change. In deciding whether he has done all that he could reasonably be expected to do under the circumstances to comply with the technical requirements of the policy, we should try to place ourselves in his position.

"It was no fault of Lt. Gallagher's that his letter to the company was not received by the company. But there is no doubt that he wrote the company. If he had not, why did he write to his wife that he had written the company and why did he send her the policy and give her instructions to get a 'revised policy' from the Company? *His intention to make her the beneficiary is unchallenged by any evidence.*" (Italics added.)

On January 14, 1948, the Circuit Court of Appeals for the Fifth Circuit handed down an opinion in the case of *Mitchell v. United States*, 165 F. (2d) 758, which is simi-

lar in some respects to the instant case although the facts are not as persuasive of a change of beneficiary as are the facts of this case. It is understood that a petition for writ of certiorari is pending in the *Mitchell* case, consequently, the court will not be further burdened with a discussion of it. The same court decided another similar case on January 23, 1948, *McKewen v. McKewen*, 165 F. (2d) 761, in which no petition for writ of certiorari was filed. Both cases are cited by the Honorable Circuit Court of Appeals for the Fifth Circuit in its opinion in this cause, and fully support the judgment of affirmance rendered. The case at bar presents the strongest fact situation of the three, and is manifestly fortified by reason and authority.

As noted on page 9 of this brief, the court said in *Bradley v. United States*, ~~*supra,*~~ [143 F. (2d) 573, 577]:

> "In every case involving war risk insurance wherein the courts have recognized and decreed a change of beneficiary, the facts have amply shown not only an expressed intention, but positive and unequivocal acts on the part of the insured, designed to effectuate his expressed intention. *Kaschefsky v. Kaschefsky, supra; Johnson v. White, supra; Peart v. Chaze, supra; Claffy v. Forbes, supra; Farley v. United States, supra.* And in the absence of some act or deed having for its purpose the execution of the insured's intention, the courts have refused to decree a change of beneficiary. *Kingston v. Hines* (D. C.), 13 F. (2d) 406; *Gifford v. United States, supra; Chichiarelli v. United States, supra; Layne v. United States*, 7 Cir., 3 F. (2d) 431; *Leahy v. United States, supra;* see also Annotation, 55 A. L. R. 580."

It is considered that the meaning of the opinion in the *Bradley* case can perhaps be better understood by a consideration of the cases cited in the quoted portion of the opinion.

In *Kaschefsky v. Kaschefsky*, 6th Cir., 110 F. (2d) 836, the facts were that while the soldier's war risk insurance policy named a brother as his beneficiary, he wrote several letters from Camp Jackson to his sister, "expressing his intention to make all of his sisters and brothers equally participating beneficiaries of the insurance contract, as it was his original purpose to do when he applied for the policy, at which time he was, however, instructed to name but a single beneficiary." These letters, which were not forwarded to the Veterans Administration until after the veteran's death, were treated by the court as changing the beneficiary from the one brother to all the brothers and sisters.

In *Johnson v. White*, 8th Cir., 39 F. (2d) 793, the insured died of influenza and meningitis in an army camp in the United States, having married after induction into the Service and having written two letters to his wife in which he stated, respectively, that he was going to change his insurance and that he was still trying to do so. Proof was made that the insured went to company headquarters and told the officer there that he wanted his insurance policy changed, and that the officer replied, "Give us your wife's name and we will have it changed." It was also proved that there was confusion in transferring soldiers from one company to another. The trial court's judgment

in favor of the sister to whom the insuance had been made payable when it was taken out by the soldier prior to his marriage, was reversed and judgment rendered for the widow. Notice was taken of the fact that the insured was an illiterate man, that, contrary to the situations presented to the courts in *Leahy v. United States*, 10 F. (2d) 617; *Layne v. United States*, 3 F. (2d) 431, and *Chichiarelli v. United States*, 26 F. (2d) 484, there was not "ample opportunity, while the assured was not in the military service, to have complied with the required formalities in effecting a change of beneficiary." The court also said:

> "The evidence is convincing that the insured intended to change the beneficiary and name the plaintiff instead of his sister as such beneficiary. Mere intention so to do is not sufficient, but here this intention was followed by acts through which he attempted to accomplish this change."

Peart v. Chaze (D. C. Louisiana), 13 F. (2d) 908, is not important because of the difference in the facts. In that case the veteran twice requested that change of beneficiary forms be furnished him, and more than enough time elapsed for compliance with his request by the Veterans Administration. It was held that the Veterans Administration's failure to furnish forms upon which the insured could make the designation of a new beneficiary could not operate to defeat his manifest intention and desire. *Farley v. United States* (D. C. Oregon), 291 Fed. 238, is similarly of little value, because in that case the deceased soldier, having made mistakes in the forms given him, executed new forms in blank and left them with the proper officer, who made certain changes and corrections in pencil, at-

tached them to the blank forms to be later filled in, and retained the new forms for the purpose of completing and forwarding to the Veterans Bureau, which apparently was not done, as the forms could not be found after the soldier's death. *Claffy v. Forbes* (D. C.), 280 Fed. 233, has previously been considered in this brief, on pages 8 to 9.

It is respectfully submitted that the facts in the above group of cases, recognized by the court in *Bradley v. United States* to constitute "positive and unequivocal acts on the part of the insured, designed to effectuate his expressed intentions", are none of them more persuasive in behalf of a finding of change of beneficiary than are the facts presented by this record. It is further respectfully submitted that the following group of cases, the facts in which were regarded by the court in *Bradley v. United States* as showing no "act or deed having for its purpose the execution of the insured's intention", are all materially different from the case now before the court, except possibly *Kingston v. Hines* (D. C. Michigan), 13 F. (2d) 406. No report of the case of *Gifford v. United States*, 289 Fed. 833, is available to respondent's counsel.

In *Kingston v. Hines*, the facts were that after marriage the insured soldier, who died during the first World War in a hospital in the United States, wrote two letters in which he said that he was going to change the insurance from his wife to his mother, and another letter about ten days later in which he stated, "I don't remember whether I told you or not that I had my insurance made out to you." After observing that the two first letters had no probative

value, being "nothing more than the expression of an intent to change the beneficiary at a later time", the court said that the only evidence from which it might be said that steps were actually taken to change the beneficiary was contained in the last letter; and rejected this as hearsay, contrary to the rule in Texas and the holdings of the courts in numerous other cases cited in this brief. It is evident that the additional ground upon which the judgment was rested was in the nature of an afterthought, and is neither the law nor applicable to the facts of the case now before this Honorable Court for determination.

The case of *Chichiarelli v. United States* (D. C. Colorado), 26 F. (2d) 484, is unimportant because the act of the insured, who died in 1925, in holding forms for change unexecuted in his possession for three months, was construed by the court as indicating a change of heart on the veteran's part and a decision by him not to go ahead with the change of beneficiary contemplated at the time he wrote the Veterans Administration for forms.

The statement made by the court in *Layne v. United States*, 7th Cir., 3 F. (2d) 431, is so general that the effect of the holding and opinion that the trial court correctly ruled there was no change of beneficiary, is left in doubt, to-wit:

> "We have read carefully the whole unabstracted record in this case. Upon the question of the change in beneficiary from Layne's brother and sister, the individual defendants, to plaintiff, the whole of the evidence, taken most favorably to plaintiff, amounts to no more than that Frank Chance Layne said that a paper, then present and to which his name was

signed, was made for the purpose of transferring his War Risk Insurance to his wife; that he took the paper and said he was going to mail it. Nobody read the contents of the paper, nobody saw it mailed, and Layne did not tell anybody that he mailed it. That was a year or more after the marriage. If mailed, the paper did not reach the Department, and its contents were not further proven. So far as the record shows, it never passed out of the possession of Layne."

The case of *Leahy v. United States*, 9th Cir., 15 F. (2d) 949, has already been discussed in this brief, on pages 15 and 19.

Before concluding, the respondent desires to call the court's attention to the following additional cases, all of which support her right to the benefits under the policy of insurance issued on the life of Arthur R. Ervin:

Steele v. Suwalski, 7th Cir., 75 F. (2d) 885, 99 A. L. R. 588;

Shepherdson v. United States (D. C.), 271 Fed. 330;

Ambrose v. United States (D. C. New York), 15 F. (2d) 52;

Schroeder v. United States (D. C. Ohio), 24 F. (2d) 420;

United States v. Tuebert (D. C. New York), 37 F. (2d) 895.

Of these cases, *Shepherdson v. United States* is considered most nearly in point. In that case the court found that a change of beneficiary was effectuated by a letter *which was not to be found after the death of the insured*, giving full effect to it as a designation of a new beneficiary.

The petition for writ of certiorari in this case does not have such merit as to require the granting of the writ. The jury's verdict in the District Court reached a just result, and there is nothing in the decided cases compelling a holding that the testimony of respondent's witnesses was insufficient to take the case to the jury.

Under the circumstances attendant upon the writing of it, Corporal Ervin's letter evidences, albeit not conclusively, the completion and forwarding of proper beneficiary change forms to the Veterans Administration. The letter and these same circumstances also raised an issue of fact as to whether Corporal Ervin did all that was reasonably within his power to change the beneficiary of his insurance.

WHEREFORE, the respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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